Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Tariff Filing Requirements for Interstate Common Carriers	)	CC Docket No. 92-13

To: The Commission

COMMENTS OF GENERAL COMMUNICATION, INC.

General Communication, Inc. ("GCI"), by its attorneys, submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") released on January 28, 1992 (FCC 92-35, Mimeo 38335).

GCI is a nondominant interstate, intrastate and international telecommunications carrier providing service within Alaska and between Alaska and other points worldwide. As noted in the NPRM, in the Fourth Report and Order in the Competitive Carrier proceeding, 95 FCC 2d 554 (1983), the Commission, after concluding that its statutory authority permitted it to do so, decided to forbear from requiring nondominant interexchange carriers to file interstate tariffs. NPRM at ¶ 3.

GCI does not take a position in these Comments on the lawfulness of the Commission's forbearance policy. However, should the Commission now find that it cannot lawfully continue to forbear from requiring nondominant carriers to file tariffs and issue an order that nondominant carriers must in the future offer interstate services pursuant to tariff, the Commission should make clear that such an order has prospective effect only.

The Commission has previously recognized that a prospective tariff requirement would be the only lawful way to proceed should it find that a

tariff requirement is necessary at all. On the same day that it released the NPRM, the Commission released a Memorandum Opinion and Order in AT&T Communications v. MCI Telecommunications Corporation, FCC 92-36, Mimeo 38336 (released January 28, 1992). In that Order, the Commission dismissed a complaint by AT&T that challenged the lawfulness of the offering by MCI of interstate telecommunications services under rates and terms not contained in a tariff filed with the Commission. The Commission ruled:

> MCI's conduct, in this regard, at all times complied with what the Commission, in the Fourth Report and Order, has said MCI may do, i.e., provide interstate telecommunications service at rates and on terms that are not contained in tariffs on file with the Commission. . . . Under these circumstances, it would be manifestly unfair to entertain AT&T's claim that MCI's alleged past conduct, which the Commission explicitly approved in advance, may give rise to a finding of liability.

Id. at ¶ 13 (citing Arizona Grocery v. Atchison, Topeka and Santa Fe Railway Co., 284 U.S. 370, 389 (1932); Nader v. FCC 520 F.2d 182, 202-203 (D.C. Cir. 1975); Bowen v. Georgetown University Hospital, 109 S.Ct. 468, 480 (1988)) (footnotes omitted).

The Commission has previously relied on the same reasoning in refusing to hold carriers liable for actions which were permissible at the time they were taken. For instance, in MCI v. AT&T, 74 FCC 2d 184 (1979) the Commission refused to apply its Resale and Shared Use decision to AT&T conduct that occurred prior to the issuance of the decision. The Commission explained that while it had "concluded that restrictions on resale and shared use were violative of Sections 201(b) and 202(a) of the Communications Act," since AT&T's action of restricting resale occurred prior to the announcement of that policy, "it would be unfair to give Resale and Shared Use retroactive

application because the findings of unlawfulness are related to a determination of new policy." 74 FCC 2d at 193-194.

The Commission's refusal to apply new policies and rules against those who relied upon old policies and rules is consistent with Supreme Court authority that laws generally should not be applied retroactively. See, e.g., Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988) ("retroactivity is not favored in the law"); Greene v. United States, 376 U.S. 149, 160 ("the first rule of construction is that the legislation must be considered as addressed to the future, not to the past); Bennett v. New Jersey, 470 U.S. 632, 639 (1985) (recognizing the "venerable rule of statutory interpretation" that "statutes affecting substantive liabilities are presumed to have only prospective effect.").

Consistent with this Supreme Court precedent, in NLRB v. Majestic Weaving Co., the Second Circuit admonished the National Labor Relations Board that "a decision branding as 'unfair' conduct stamped 'fair' at the time a party acted, raises judicial hackles." 355 F.2d at 854, 860 (2d Cir. 1966). The court also said that "where an agency alters an established rule defining permissible conduct which has been generally recognized and relied on throughout the industry it regulates," it is "peculiarly important" that the agency's action be prospective in application. Id. at 860-61.

In International Union, United Automobile, Aerospace & Implement Workers of America v. Brock, 783 F.2d 237 (D.C. Cir. 1986), the U.S. Court of Appeals for the District of Columbia Circuit declared that while an agency could reverse its interpretation of a statute, "an agency may not impose liability retroactively when the individual has acted in accordance with the

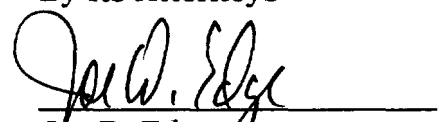
agency's own announced interpretation of the statute." 783 F.2d at 248. The D.C. Circuit has also explained that "[a]lthough an administrative agency is not bound to rigid adherence to its precedents, it is equally essential that when it decides to reverse its course, it must give notice that the standard is being changed . . . and apply the changed standard only to those actions taken by parties after the new standard has been proclaimed as in effect." RKO General, Inc. v. FCC, 670 F.2d 215, 223-24 (D.C. Cir. 1981) (quoting Boston Edison Co. v. FPC, 557 F.2d 845, 849 (D.C. Cir. 1977)), cert. denied, 456 U.S. 927 (1982).

For the past ten years, the Commission has permitted, even encouraged, nondominant carriers to provide interstate services without filing tariffs. Under Supreme Court and the Commission's own precedent, if the Commission should now find that it is obligated to impose a tariff-filing requirement on nondominant carriers, that requirement should have prospective effect only, and the Commission should make clear that nondominant carriers who have relied on its forbearance policy are not liable for providing services pursuant to that policy.

March 30, 1992

Respectfully submitted,

GENERAL COMMUNICATION, INC.
By Its Attorneys



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CERTIFICATE OF SERVICE

I, Sue W. Bladek, do hereby certify that copies of the foregoing Comments of General Communication, Inc. were delivered by messenger on March 30, 1992 to:

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